

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

MARCUS WHYBARK, an individual,
Plaintiff,

v.

CARL D. WHALEN, an individual,
and KENNETH P. FREDERICKSEN,
an individual

Defendants.

No.

COMPLAINT

(JURY DEMAND)

INTRODUCTION

1. On the evening of July 9, 2023, shortly before 7:00 p.m., two Snohomish County Sheriff's deputies repeatedly shot Marcus J. Whybark in front of his home in Sultan, Washington. They wounded him grievously and nearly killed him.

2. Without warning or justification, the officers unleashed a barrage of gunfire at Mr. Whybark from close range with their .45 and 9mm handguns. When they shot him, Mr. Whybark was unarmed, seated on the bed of a pickup truck, and perched in a defensive posture with his hands covering his head. He presented no immediate threat to the officers or anyone else. This slow-motion footage from an officer's body worn camera shows the officers shooting Mr. Whybark in rapid succession, seeking to end his life: <https://whybark2023.wistia.com/medias/cjnup52fml>.

1 3. The two sheriff's deputies are Defendants Carl D. Whalen and Kenneth P.
2 Fredericksen. Their grossly unlawful use of deadly force was captured on camera and is further
3 detailed below.

4 4. Although Mr. Whybark miraculously survived, he sustained serious injuries:
5 multiple penetrating gunshot wounds to his arm, pelvis, torso, and both legs as well as a grazing
6 gunshot wound to his head, other physical injuries, and severe psychological trauma.

7 5. This federal civil rights lawsuit seeks to hold Defendants Whalen and Fredericksen
8 accountable for their egregious, unnecessary, reckless, and blatantly unconstitutional use of deadly
9 force.
10

11 **JURISDICTION AND VENUE**

12 6. This Court has original jurisdiction over Plaintiff's civil rights claims under 42
13 U.S.C. § 1983, pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (civil rights).
14 This Court has supplemental jurisdiction over Plaintiff's related state law claims under 28 U.S.C.
15 § 1367(a).
16

17 7. Venue is proper in this forum under 28 U.S.C. § 1391(b) because all the events that
18 support Plaintiff's allegations occurred in this judicial district and because the Defendants reside in
19 this judicial district.
20

21 **PARTIES**

22 8. Plaintiff Marcus Whybark is an individual who resides in Washington State and
23 lives in the City of Sultan in Snohomish County.

24 9. Defendant Carl D. Whalen is an individual residing in this judicial district. At all
25 relevant times, Defendant Whalen was a Snohomish County deputy sheriff acting within the course
26 and scope of his employment. All acts and omissions of Defendant Whalen alleged in this complaint

1 were done under color of state law in his capacity as a law enforcement officer for Snohomish
2 County.

3 10. Defendant Kenneth P. Fredericksen is an individual residing in this judicial district.
4 At all relevant times, Defendant Fredericksen was a Snohomish County deputy sheriff acting within
5 the course and scope of his employment. All acts and omissions of Defendant Fredericksen alleged
6 in this complaint were done under color of state law in his capacity as a law enforcement officer
7 for Snohomish County.
8

9 **FACTUAL ALLEGATIONS**

10 **A. Background Facts**

11 11. Sultan is a small city of approximately 5,000 people located in Snohomish County
12 about 23 miles east of Everett. Sultan does not have an active police force of its own. Instead, it
13 contracts with Snohomish County to provide law enforcement services in the city. Pursuant to this
14 contract, the Snohomish County Sheriff's Office provides traditional law enforcement activities
15 within the city limits of Sultan through its employed sheriff's deputies.
16

17 12. Marcus Whybark, now 45 years old, grew up in Sultan and is a long-time resident
18 of the community. He owns his own home, located at 308 2nd Street in a quiet residential
19 neighborhood in Sultan. Gainfully employed for most of his adult life with two loving children and
20 no significant criminal history, he has also long struggled with an addiction to alcohol. He is an
21 alcoholic.
22

23 13. The events in this case took place on a summer evening, July 9, 2023. Earlier that
24 day, Mr. Whybark spent the afternoon at an outdoor music performance in town a few blocks away
25 from where he lived. Mr. Whybark was with his companion, Loretta Nichols, who had been
26

1 performing at the event. The two returned to Mr. Whybark's home in the late afternoon or early
2 evening.

3 14. Consistent with his alcohol addiction, Mr. Whybark drank alcohol in the days before
4 July 9th. However, he was attempting to abstain from alcohol on July 9th and had not consumed
5 any alcohol that day. Further, although Mr. Whybark has struggled with methamphetamine use
6 during his adult life and had used methamphetamine in previous days, he had not used
7 methamphetamine on July 9th.
8

9 15. Shortly after returning home in the late afternoon or early evening of July 9th, Mr.
10 Whybark began to experience a mental health episode (possibly brought on by the effects of alcohol
11 withdrawal) that caused him to feel confused, disoriented, and anxious. Mr. Whybark began
12 walking around the house saying nonsensical things and expressing irrational concerns about the
13 safety of the house. At some point, he picked up a knife. He did not hurt Ms. Nichols with the knife
14 or threaten to do so, but she became concerned about his strange behavior, left the house, and went
15 outside.
16

17 16. Parked on the street just outside Mr. Whybark's home were two pickup trucks. One
18 truck, which was larger and dark blue, was a GMC truck that belonged to Mr. Whybark. The second
19 truck, which was smaller and light blue, was a Ford Ranger. The light-blue Ford Ranger was parked
20 directly in front of Mr. Whybark's truck. It belonged to Ms. Nichols.
21

22 17. At about the same time Ms. Nichols walked outside, Mr. Whybark also left the home
23 and walked outside. Ms. Nichols got into her truck. Mr. Whybark began to meander about on the
24 lawn, sidewalk, and street in front of his home periodically talking to Ms. Nichols who was now
25 seated in her truck. Mr. Whybark was holding the knife as he meandered.
26

1 18. Mr. Whybark was wearing shorts and a T-shirt. It was light outside and the
2 temperature was warm. Mr. Whybark's dog stayed close by his side as he ambled around the yard,
3 sidewalk, and street.

4 19. Mr. Whybark continued to pace around outside his house with no apparent purpose,
5 periodically talking to Ms. Nichols who was still seated inside her truck. Mr. Whybark was acting
6 strangely and was still holding the knife but did not hurt or threaten to hurt anyone.
7

8 20. At approximately 6:40 p.m., a neighbor came down the street riding his bicycle. The
9 neighbor was an older gentleman wearing a ball cap and suspenders. He and Mr. Whybark had
10 known each other for many years. The man saw that Mr. Whybark was acting strangely and holding
11 a knife and decided to stop his bicycle near Mr. Whybark to talk with him and ask whether he was
12 alright. The man got off the bicycle. Ms. Nichols had been seated in her truck, but she also got out
13 and stood by her truck as Mr. Whybark and the man interacted in the street. The man had never
14 seen Mr. Whybark act this way before and was concerned about his strange behavior.
15

16 21. Things became somewhat tense: Mr. Whybark and the man engaged in a brief
17 physical tussle, which lasted a very short time. Mr. Whybark did not hurt the man or attempt to do
18 so. After this momentary exchange, the man walked away, uninjured. He walked back down the
19 street, about twenty yards away from where Mr. Whybark was standing. Mr. Whybark remained in
20 the street in the location (in front of his house) where he had been standing and previously pacing
21 around.
22

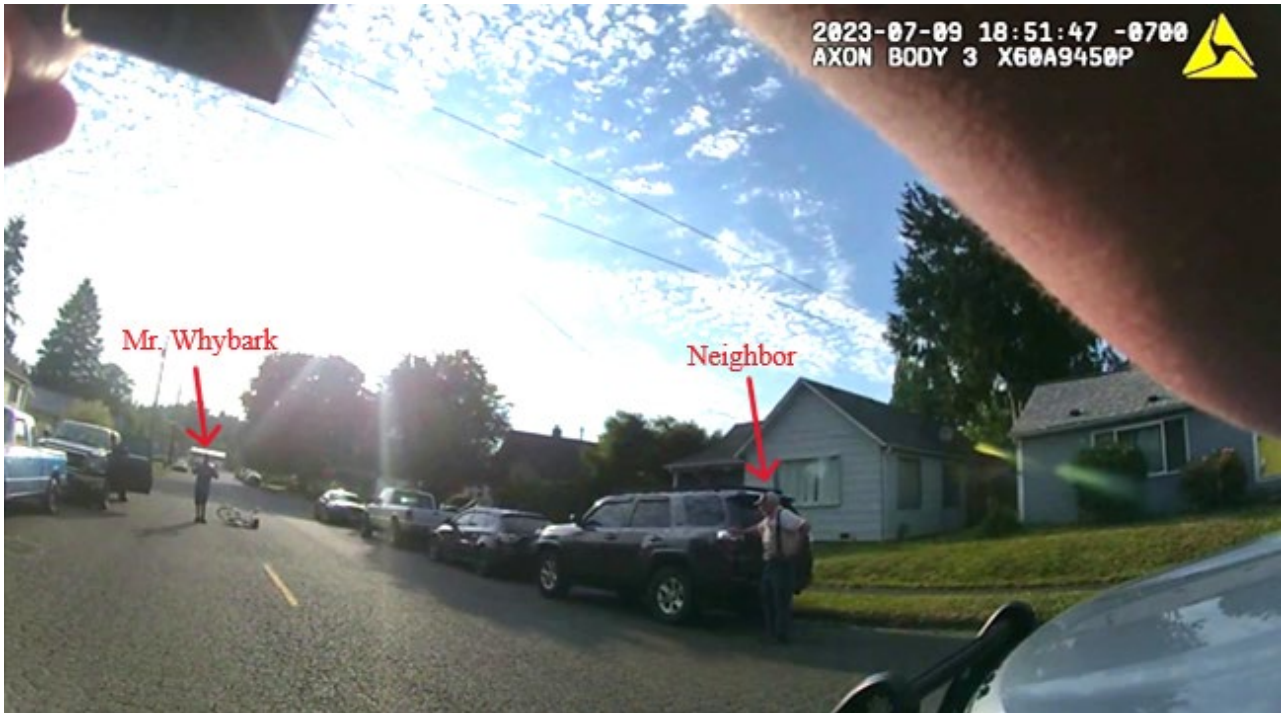
23 22. Still standing many feet away from Mr. Whybark, the man calmly called 911 to
24 report the interaction. The call resulted in two Snohomish County Sheriff's deputies coming to the
25 location.
26

B. Defendant Fredericksen Arrives

23. Defendant Fredericksen was the first to arrive. Defendant Fredericksen was a relatively new officer who had been employed by the Snohomish County Sheriff's Office for about 16 months and who had graduated from the Washington State Basic Law Enforcement Academy about 11 months earlier. He drove his patrol vehicle to the scene.

24. Defendant Fredericksen arrived at about 6:50 p.m. and parked his patrol vehicle in the street about 25 yards (75 feet) from where Mr. Whybark was standing. He got out of his patrol car.

25. The neighbor stood some distance away with his hand on his hip looking on. Ms. Nichols got back in her truck and remained seated inside. Defendant Fredericksen withdrew his handgun and held it near his chest. He activated his body worn camera. This screenshot shows Defendant Fredericksen's perspective as he looked down the street at Mr. Whybark shortly after arriving at the location:



1 26. Defendant Fredericksen saw that Mr. Whybark was standing in the street near a
2 bicycle that was lying in the road with his hands in the air. He saw that Mr. Whybark was not
3 actively committing any crime. He could also see that there were no other people within Mr.
4 Whybark's immediate vicinity. He knew there was a woman in the light blue Ford Ranger pickup,
5 and he briefly spoke with the neighbor (standing to his right) who was looking on. He saw that the
6 man was clearly uninjured, calm, and in no apparent distress. The man told Defendant Fredericksen
7 that the person in the street was Marcus Whybark.
8

9 27. Defendant Fredericksen could see there was a knife lying on the street a few feet to
10 the left of where Mr. Whybark was standing. Mr. Whybark was standing in the middle of the street
11 doing nothing imminently threatening. It was clear, however, that Mr. Whybark was confused and
12 having a mental health episode of some sort. Indeed, according to Defendant Fredericksen, he heard
13 Mr. Whybark "rambling about something that made no sense" and "making rambling noises with
14 his mouth and not speaking." According to Defendant Fredericksen, he "believed" that Mr.
15 Whybark was "under the influence of a narcotic."
16

17 28. For about 90 seconds, Defendant Fredericksen did a commendable job talking to
18 Mr. Whybark from his distant position. He calmly told Mr. Whybark to "come this way," "come
19 talk to me," "step away from the knife," and gave him various other directives. Mr. Whybark did
20 not follow Defendant Fredericksen's directives, but nor did he make any threatening gesture or
21 motion. Mr. Whybark basically just stood in the street. The situation was relatively calm, and no
22 one was in any immediate danger. Defendant Fredericksen announced on his radio that "the knife
23 is on the ground."
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1 **C. Defendant Whalen Arrives**

2 29. Defendant Whalen, having activated his body worn camera, arrived at the location
3 just before 6:53 p.m. Defendant Whalen had over 15 years of law enforcement experience. He had
4 been promoted to sergeant approximately one year before this incident and was thus the superior
5 officer on the scene.
6

7 30. Before Defendant Whalen reached the scene, he knew, per his own admission, that
8 the knife was “out of play.” And when Defendant Whalen arrived in his patrol car, he could see
9 (just as Defendant Fredericksen could see) that Mr. Whybark was standing far away from
10 Defendant Fredericksen and that there were no people standing within his immediate vicinity. He
11 saw that Defendant Fredericksen’s car was parked and that Defendant Fredericksen was talking to
12 Mr. Whybark. Defendant Whalen could see that no person was being threatened, no crime was
13 being committed, and there was no immediate danger to anyone. Defendant Whalen saw that Mr.
14 Whybark was not holding any weapon and knew the knife was down on the ground. He also knew
15 that Defendant Fredericksen had, to that point, been simply talking to Mr. Whybark from his distant
16 position, trying to avoid any escalation of the situation—just as a prudent police officer should do
17 when interacting with a person in crisis.
18

19 31. Indeed, when Defendant Whalen first arrived, Mr. Whybark was simply standing in
20 the street, unarmed, distant from any other person, with his hands on his head. This screenshot
21 shows Defendant Whalen’s perspective as he looked down the street at Mr. Whybark when he first
22 arrived:
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D. Defendant Whalen Unjustifiably Escalates

32. Prudent police procedure at this point would have been for Defendant Whalen to take up a position near Defendant Fredericksen and proceed calmly, deliberately, and thoughtfully. Given that Mr. Whybark posed no immediate threat to anyone, a reasonable officer would have taken the time to learn more about the situation and assess how it might be resolved peacefully. There was no pressing need to do otherwise. Both officers had their service weapons and less lethal weapons available if Mr. Whybark attempted to do anything threatening or harmful.

33. But instead of proceeding calmly, deliberately and thinkingly, Defendant Whalen did the exact opposite. He immediately jumped out of his patrol car. He then aggressively, unnecessarily, and unreasonably *escalated* the situation by drawing his taser and marching towards Mr. Whybark at a rapid clip, pointing his weapon at Mr. Whybark while simultaneously shouting commands even though he knew (or should have known) that the person he was shouting at was mentally confused.

34. Within a second of exiting his patrol vehicle, and even though Mr. Whybark *wasn't even holding the knife*, Defendant Whalen loudly barked: "PUT IT DOWN NOW! DO YOU UNDERTAND ME, GET ON THE GROUND!"

35. Defendant Whalen gave Mr. Whybark no time to process his command or to get on the ground as ordered. Instead, taser drawn and pointed at Mr. Whybark, Defendant Whalen marched towards him and closed the gap between himself and Mr. Whybark in a few seconds. Then he immediately tased Mr. Whybark, causing him to collapse to the ground near the open door of his pickup truck.

36. Mr. Whybark's dog was, at this time, sitting in the passenger seat of Mr. Whybark's truck. As a natural reaction to someone violently assaulting her owner, the dog came out of the truck and began barking at Defendant Whalen. Defendant Whalen dropped his taser, drew his .45 caliber handgun, and immediately shot the dog dead as shown here:



E. The Unlawful Shooting of Mr. Whybark

37. Mr. Whybark was shocked, confused, and scared for his life. Though he had been merely standing in the street moments before, he had just been violently tased and his dog had been shot before his very eyes. Mr. Whybark got off the ground and turned his back to Defendant Whalen as shown here:



38. Scared for his life, Mr. Whybark tried to run away from the hyper-aggressive Defendant Whalen as shown here:



39. Mr. Whybark was so frightened he didn't know what to do. Ahead of him was the light-blue Ford Ranger pickup belonging to Ms. Nichols. Behind him was the officer who had just tased him and killed his dog. In a desperate bid to escape Defendant Whalen's unwarranted aggression, Mr. Whybark leaped onto the hard composite cover of the Ford Ranger pickup, put his right hand on the pickup bed cover, and exposed his left hand into the air as shown here:



40. As mentioned earlier, Ms. Nichols was seated inside the light-blue pickup truck upon which Mr. Whybark was now sitting. The two defendants knew she was seated inside. Both defendants now had their guns drawn and pointed at Mr. Whybark—with Ms. Nichols *directly in their line of fire*. This closeup shows the same moment in time as the previous screenshot with Ms. Nichols's head clearly visible in the back window of her pickup:



41. Mr. Whybark sat down on the pickup bed cover. And at that very moment, one of the defendants fired the first shot at Mr. Whybark (and in the direction of Ms. Nichols) as shown here:



12 42. Hearing the first shot ring out, Mr. Whybark instinctively went into a defensive
13 posture to protect his head as shown here:



43. Mr. Whybark then covered his whole head with his arms and hands, and tried to bury his chin in his chest as shown here:



44. While Mr. Whybark was seated in the position depicted above, hopelessly trying to protect himself, with arms and hands covering his head and his chin buried in his chest, completely unarmed and incapable of hurting anyone, both defendants unleashed a barrage of gunfire at him.

45. As he was seated in the position shown above, the defendants shot him at least four more times. This slow-motion video from Defendant Whalen's body camera shows the moment the defendants shot Mr. Whybark repeatedly, in quick succession, as he was seated in the defensive posture shown in the image above: <https://whybark2023.wistia.com/medias/9ysmk0zvav>

46. The shots hit Mr. Whybark in the legs, arm, pelvis, torso, and head and dropped him like a sack of rocks to the hard pavement below:



47. Aid workers arrived, and emergently transported Mr. Whybark to Providence Hospital in Everett for care and treatment for his multiple gunshot wounds.

F. Videos of the Shooting

48. As mentioned above, the shooting and the events leading up to the shooting were captured on video. This includes body worn camera footage from Defendants Fredericksen and Whalen. It also includes video surveillance footage from a neighbor's Ring security camera positioned across the street looking in the direction of the events.

49. The following real-time video footage is from Defendant Fredericksen's body worn camera. It captures the events from Defendant Fredericksen's perspective from the moment he activated his body worn camera through the time Defendant Whalen arrived and escalated the situation, and through the time the two defendants repeatedly shot Mr. Whybark. It is 2 minutes

1 and 8 seconds long. The events it depicts are incorporated into this Complaint in full. The video is
 2 viewable here: <https://whybark2023.wistia.com/medias/obltsn9qpt>

3 50. The following real-time video footage is from Defendant Whalen's body worn
 4 camera. It captures the events from Defendant Whalen's perspective from the moment he arrived
 5 on the scene and through the time the two defendants repeatedly shot Mr. Whybark. It is 46 seconds
 6 long and the depicted events are incorporated into this Complaint in full. The video is viewable
 7 here: <https://whybark2023.wistia.com/medias/9we1a3ihfi>

8 51. The following real-time video footage is from a Ring surveillance camera from a
 9 neighbor's house across the street. It captures the events from the moment the two defendants
 10 marched towards Mr. Whybark through the time they repeatedly shot him. It is 28 seconds long
 11 and the depicted events are incorporated into this Complaint in full. The video is viewable here:
 12 <https://whybark2023.wistia.com/medias/4id76w1j3p>

13 **G. Defendants' False Statements Following the Shooting**

14 52. After the shooting, both defendants made several demonstrably false statements
 15 about what occurred leading up to and surrounding the shooting.

16 53. For his part, Defendant Fredericksen gave a written statement at the direction of
 17 then-Snohomish County Sheriff Adam Fortney. In his initialed and signed statement, which he
 18 purported to be "true," Defendant Fredericksen claimed, among other things, that after Mr.
 19 Whybark's dog was shot, Mr. Whybark got onto the covered bed of the light-blue pickup truck and
 20 lay "prone on his stomach," while "screaming" and "trying to stab the window on the passenger
 21 side of the [pickup] with the knife." He claimed that Mr. Whybark "was trying to jam the knife into
 22 the window of the [pickup] as if he were trying to break the window." He claimed that Mr. Whybark
 23 "spent about 10-15 seconds" "trying to break the window with the knife." He claimed that Mr.
 24
 25
 26

1 Whybark “was “staring” at him and Defendant Whalen as a “pre-attack indicator” and “was about
2 to push himself off” the truck and that he was “trying to actively harm people with the knife” when
3 he was shot. And he claimed that after getting on the pickup bed, Mr. Whybark “rear[ed] his right
4 hand back down to his hip area and thrust the knife over his head like a haymaker punch into the
5 back of the [pickup’s] rear window.” These statements are demonstrably false. They are
6 contradicted by the clear video evidence. Defendant Fredericksen knowingly made these false
7 statements in an effort to justify his unlawful use of deadly force.
8

9 54. For his part, Defendant Whalen also gave a written statement at the direction of
10 then-Snohomish County Sheriff Adam Fortney. In his initialed and signed statement, which he
11 purported to be “true,” Defendant Whalen claimed, among other things, that when he arrived on
12 the scene, Mr. Whybark was “pacing back and forth in the street.” He claimed that Mr. Whybark
13 “posed an immediate threat to others.” He originally claimed, before reviewing the video, that he
14 “fired four or five rounds” at Mr. Whybark before he got onto the bed of the pickup truck after
15 which time Mr. Whybark “got down onto the ground into the street,” and said “something similar
16 to the fact he was done.” These statements are demonstrably false and contradicted by clear video
17 evidence. Defendant Whalen acknowledged elsewhere in his statement that after reviewing the
18 video footage, his “recollection was inaccurate.” Moreover, shortly after the shooting, when
19 supervising officers asked him about (1) the direction of the shots fired and (2) the trail of blood
20 left by the dog he shot and killed, Defendant Whalen gave untrue answers, captured on other
21 segments of body-worn camera footage. Specifically, footage shows Defendant Whalen pointing
22 in an entirely different direction than the real shooting when asked which direction the shots were
23 fired. And when asked about a trail of blood leading up to Mr. Whybark’s house, which had been
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1 left by the mortally wounded dog retreating to her home, Defendant Whalen stated that the blood
2 was “unrelated to my incident” and had been there previously.

3 **H. The Defendants’ Use of Deadly Force was Unconstitutional and Otherwise Unlawful**

4 55. The defendants’ use of deadly force was unreasonable and grossly excessive in
5 violation of Mr. Whybark’s well-established Fourth Amendment right to be free from excessive
6 force.
7

8 56. In shooting Mr. Whybark, the defendants acted intentionally, knowingly, recklessly,
9 and/or maliciously in violation of Mr. Whybark’s well-established rights under the Fourth
10 Amendment to be free from excessive force.

11 57. In shooting Mr. Whybark, the defendants assaulted Mr. Whybark without
12 justification in violation of his rights under Washington law.

13 58. In shooting Mr. Whybark, the defendants committed battery against Mr. Whybark
14 without justification in violation of his rights under Washington law.

15 59. In shooting Mr. Whybark, the defendants’ conduct was intentional, extreme, and
16 outrageous and caused physical harm and emotional distress to Mr. Whybark. The defendants
17 committed the tort of outrage against Mr. Whybark in violation of his rights under Washington law.
18

19 **I. Mr. Whybark’s Damages**

20 60. The Defendants’ conduct caused Mr. Whybark to sustain significant injuries and
21 damages, including physical pain, internal and external injuries to his body, psychological trauma,
22 extreme emotional distress, disability, disfigurement, and loss of enjoyment of life. Mr. Whybark
23 has suffered these damages since the date of the shooting, and he will continue to suffer them in
24 the future.
25
26

61. In addition, the officers' conduct caused Mr. Whybark to sustain economic losses. These include medical bills and other bills and expenses associated with his treatment and attempts at recovery, as well as future care needs and costs associated with his physical and psychological injuries and disabilities. Although Mr. Whybark also sustained damages in the form of lost earnings, he is waiving that specific element of economic damages for purposes of this lawsuit.

J. Possibility of Amending Complaint to Add Snohomish County as an Additional Defendant

62. Discovery in this matter will include discovery directed not only to Defendants Fredericksen and Whalen, but also to their employer, Snohomish County. Discovery may include, *inter alia*, requests to produce various documents and materials relating to the training, supervision, and employment of Defendants Fredericksen and Whalen. Discovery may also include requests to produce all documents and materials relating to previous uses of force or the ratification thereof.

63. While it is anticipated that the production of information generally described in the foregoing paragraph will be relevant to the claims asserted against Defendants Fredericksen and Whalen, the discovery may also result in Plaintiff amending this Complaint to assert a *Monell* cause of action against Snohomish County.

CLAIMS AGAINST DEFENDANTS

64. Defendants Fredericksen and Whalen are liable under 42 U.S.C. § 1983 for using excessive force against Mr. Whybark in violation of his rights under the Fourth Amendment to the United States Constitution.

65. Defendants Fredericksen and Whalen are liable under Washington law for torts of assault, battery, and outrage.

JURY DEMAND

66. Plaintiff demands that this matter be tried by a jury.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays that the Court award:

A. Compensatory damages in an amount to be proven at trial, sufficient to compensate Mr. Whybark for his general damages under federal and state law including, but not limited to, damages for his physical pain, psychological trauma, emotional distress, disability, disfigurement, and loss of enjoyment of life, both past and future.

B. Compensatory damages in an amount to be proven at trial, sufficient to compensate Mr. Whybark for his economic losses for medical bills and other bills and expenses associated with his treatment and attempts at recovery, as well as his future care needs and other future costs associated with his physical and psychological injuries and disabilities.

C. Punitive damages under federal law, in an amount to be proven at trial.

D. Attorneys' fees, costs, and prejudgment interest incurred in pursuing this action as provided for in 42 U.S.C. § 1988; and

E. Any such other relief that this Court deems just and equitable under the circumstances of this case.

DATED this 20th day of May, 2024.

/s/ Edwin S. Budge

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